In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ROBERT H. MONTGOMERY
v.
THE UNITED STATES. } No. 291.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

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STATEMENT.

The claimant, a British subject, domiciled in New Orleans before and during the war, after the capture of that city by the United States forces, in April, 1862, made the following agreement with J. W. Burbridge, a loyal person residing in that city, doing business under the name of J. W. Burbridge & Co., and the agent of Leo Johnson, a planter, residing at that time within the enemy's lines:

"Know all men by these presents that it has been agreed, and it is hereby agreed, between the undersigned, as follows, to wit: Thomas D. Harris, acting as the attorney-in-fact of J. W. Burbridge & Co., of this city, the agents of Leo L. Johnson, of the parish of La Fourche, in this State, has sold, and hereby does sell, unto Robert H. Montgomery, of this city, the following crop, belonging to said Leo L. Johnson, contained in his sugar-house and purgery, on his plantation, in the parish

of La Fourche, near La Fourche Crossings, to wit: six hundred and five hogsheads of sugar, seven hundred barrels of molasses, and three hundred barrels of rum, at the following prices, to wit: For the sugar, at 4½ cents per pound; for the molasses, at 20 cents per gallon; and for the rum, at 50 cents per gallon, the weight and quantity to be determined at the time and upon the delivery thereof in New Orleans.

"The said Montgomery, in consideration of said sales so to him made, has paid, in ready money, the sum of $5,000 to said Harris, attorney-in-fact aforesaid, the receipt whereof is hereby acknowledged and accepted as so much on account of the first sugar, molasses, or rum delivered to him, said Montgomery, as aforestated; the balance to be paid by said Montgomery at each future delivery of said sugar, molasses, and rum.

"Thus agreed and done in duplicate, at New Orleans, this 9th of September, 1862.

"J. W. BURBRIDGE & CO.,
"Per THOMAS D. HARRIS,
"*Attorney.*
"R. H. MONTGOMERY.

Witnesses:
"JNO. L. CAVANNA.
"J. C. MCALLESTER."

The following order was also given to Montgomery:

"NEW ORLEANS, *September* 9, 1862.

The overseer of the plantation of Leo. L. Johnson will please deliver to the order of Robert H. Montgomery the entire crop of sugar, molasses, and rum contained in the sugar-house and purgeries, &c., on said plantation, the same having been sold to him this day.

"J. W. BURBRIDGE & CO.,
"Per T. D. HARRIS.

"Deliver the above sugar, molasses, and rum to William P. Maloney or order.

R. H. MONTGOMERY."

All the sugars and produce covered by the above agreement were then within the rebel lines of occupation, and no actual delivery or possession was taken of the same, or any attempt made to deliver or take possession until the sugar was brought into the Federal lines by the United States forces. The $5,000 mentioned in the above agreement was paid at the time, and $9,000 was paid afterward.

On the 9th of September, 1862, General Butler, the commandant at New Orleans, issued an order whereby, among other things, all the property within the district known as the district of La Fourche, and including the plantation where the sugar in question then was, was sequestrated, and all sales and transfers of the same forbidden and declared to be invalid. It was further ordered that every loyal citizen or neutral foreigner who should be found in actual possession and ownership of any property in said district, not having acquired the same by any title since the 18th of September, might have his property returned or delivered to him without sale upon establishing his condition to the judgment of the commission appointed by the proclamation; and all sales made by any person not a loyal citizen or a foreign neutral since the 18th of September were declared void. The commission was appointed to take possession of the property and make an accurate inventory of the same, and to gather and collect all personal property covered by the proclamation and to dispose of it in the manner therein provided. Immediately after the issuing of this order the Government forces took possession of Johnson's plantation and delivered to the commission about 500 hogsheads of sugar, being a portion of the sugar embraced in the contract between Burbridge and the claimant; and after deducting the charges of freight, ferriage, and commissions, &c., the net proceeds of said sugars, amounting to $37,351.49, were paid into the Treasury of the United States. Subsequently, in December, the rest of the sugars remaining on Johnson's plantation and embraced in the contract, were removed to New Orleans and sold, and the net proceeds thereof, amounting to $22,000, were, upon application to the commission, paid

over to the claimant and he receipted therefor. No opportunity was afforded the claimant to make claim for the first shipment of sugars by reason of the difficulty existing at the time of obtaining proof of the identity of the sugars shipped to New Orleans from Johnson's plantation. Burbridge & Co., for two years before May, 1862, had been the factors and agents of Johnson, and had made advances to him to enable him to make his crop on the Webster plantation, and Johnson's indebtedness for such advances, prior to December 9, 1862, amounted to $131,000. There was no evidence that Johnson at any time disputed or questioned the authority of Burbridge to make the sale of the crop in question.

The Court of Claims dismissed the petition and the claimant appealed.

ARGUMENT.

I.

Assuming (what will be considered hereafter) that the title to this sugar mentioned in the contract between Burbridge and the claimant, would have passed thereunder if the contract were legal, it is contended that the contract was void. It was a sale, by the agent of an enemy, of property in the enemy's country to an alien friend residing in this country. Burbridge did not pretend to sell the sugar except as Johnson's agent; and it is therefore unnecessary to consider whether the sale would have been valid if the sugar had been the property of Burbridge. He sold it simply as agent of Johnson, and his act was therefore Johnson's act. The sale, therefore, was an act of commercial intercourse between enemies, and was illegal and void.

United States *v.* Lane, 8 Wallace, 185.

United States *v.* Grossmayer, 9 Wallace, 72.

Kershaw *v.* Kelsey, 100 Mass., 561.

But by the occupation of New Orleans, the relation of principal and agent that had previously existed between Burbridge and Johnson was dissolved, and Burbridge had no authority to make any sale of John-

son's property, and no contract made by him in relation thereto could pass any title to the purchaser.

II.

The contract between the claimant and Burbridge, if legal, did not pass the title in the property. It amounted only to an executory contract of sale. "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted."

Benjamin on Sales, 221, 222, et seq., and cases cited.
Logan *v.* Le Mesurier, 6 Moore, P. C., 116.
McDonald *v.* Hewett, 15 Johns, 349.
Ward *v.* Shaw, 7 Wend., 406.
Boswell *v.* Green, 1 Dutcher, 390, 398.
Mitchell *v.* Commonwealth, 37 Penn., 187.
Weld *v.* Traip, 14 Gray, 330.

That this is the law of Louisiana is shown by the cases cited by Chief Justice Casey in this case in the court below.

5 Court of Claims, 658–660.

C. H. HILL,
Assistant Attorney General.

O

January 8. 1873.

Field J.

Affirmed

Clifford J.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~[illegible]~~ 6088

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

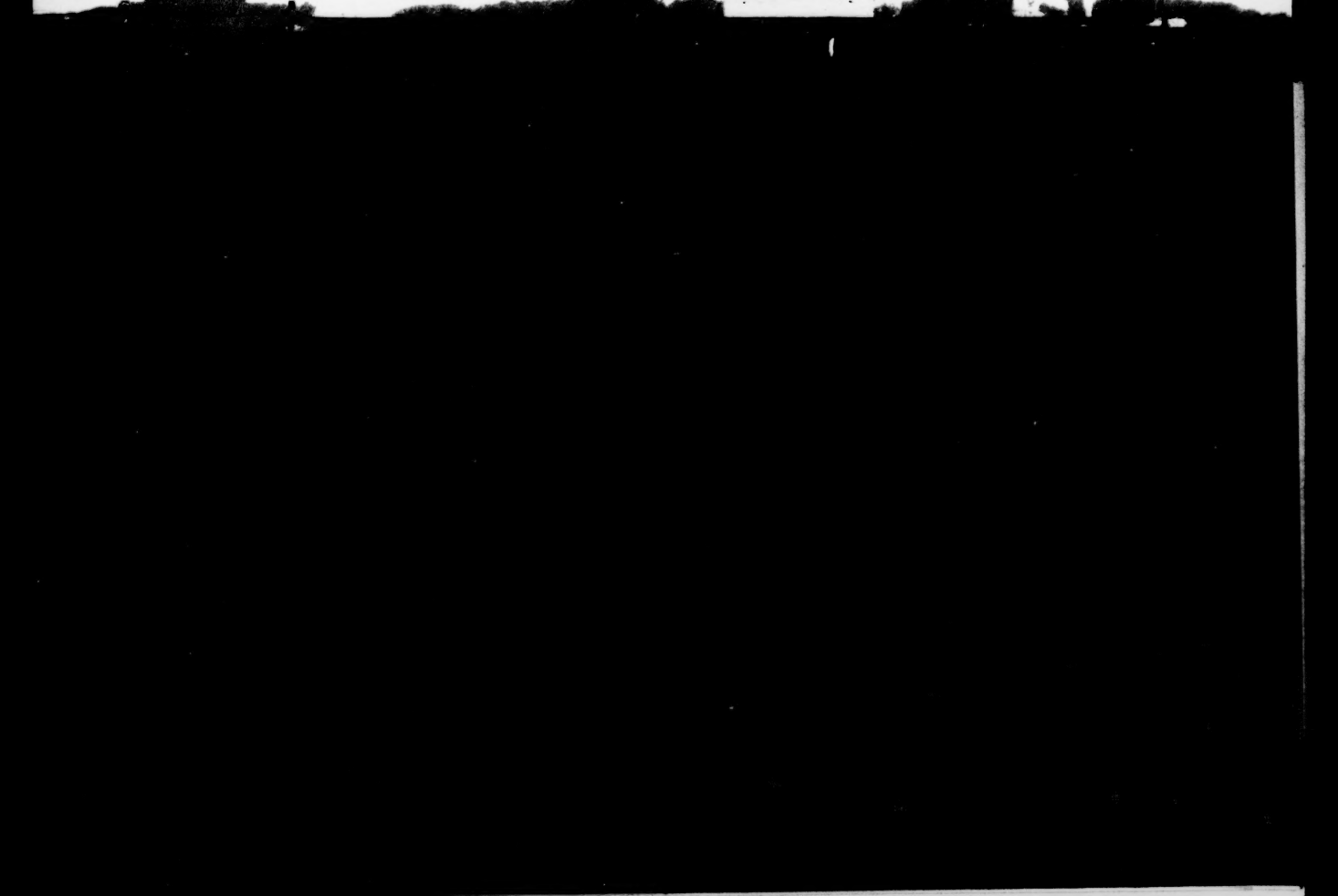
vs.

OLIVER GLADMON, BY HIS NEXT FRIEND, BURGESS K. GLADMON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 11, 1871.

Dec. 2, 1872



SUPREME COURT OF THE UNITED STATES.

No. 535.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OLIVER GLADMON, BY HIS NEXT FRIEND, BURGESS K. GLADMON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Certificate of clerk of sup. c't of Dist. of Col'a.*

CLERK'S OFFICE SUPREME COURT OF THE DIST. OF COLUMBIA.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that originals, of which the following writings are true and complete copies, are on file and of record in the clerk's office of said court, and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending and lately decided, entitled Oliver Gladmon, by Burgess K. Gladmon, his next friend, plaintiff, vs. The Washington and Georgetown Railroad Company, defendant. At law. 5533.

In testimony whereof I hereto subscribe my name and affix the seal of said court this 20th day of January, 1871.

[SEAL.] R. J. MEIGS,
Clerk, &c.
By R. J. MEIGS, JR.,
Ass't Cl'rk.

[5-ct. int. rev. stamp, canceled.]

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Oliver Gladmon, by his next friend, Burgess K. Gladmon, plaintiff, and The Washington & Georgetown Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 26th day of May, in the year of our Lord 1870, and of the independence of the United States the 94th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

TO OLIVER GLADMON:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington & Georgetown Railroad Company is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Justice.

May 27, 1870. Service acknowledged.

W. F. MATTINGLY,
R. T. MERRICK,
Att'ys for Pl'ff.

(Indorsed:) Washington & Georgetown Railroad Co., pl'ff in error, vs. Oliver Gladmon, def't in error. Filed 26 May, 1870.

3 *Declaration.—Filed Feb'y* 10, 1869.

In the supreme court of the District of Columbia.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

OLIVER GLADMON, BY NEXT FRIEND, BURGESS K. Gladmon, plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company, defendant.
} No. 5533. At law.

The plaintiff sues the defendant, a corporation duly incorporated under an act of Congress, for that, whereas, the defendant, on the 22nd day of April, A. D. 1868, at the county aforesaid, was possessed of a certain street railroad and cars, and cattle used in running on the same for the carriage of passengers. And certain servants of said defendant had the management, care, and direction of one of said cars, and the cattle drawing the same, to wit, at the county aforesaid, yet the said defendant, not minding or regarding its duty in this behalf, took so little and so bad care of the said cattle and car, that, by and
4 through the negligence, carelessness, and mismanagement of the said defendant, and its said servants, and for want of due and proper care of the said defendant and its said servants, that said cattle and car were, with great violence, driven against and upon the said plaintiff, as he, the said plaintiff, was then in and crossing over a certain street and common highway, to wit, at the county aforesaid, whereby the said plaintiff was dragged a long distance along said highway, and his legs skinned and lacerated, and his arms, head, and divers other parts of his body greatly cut and bruised, and the said plaintiff thereby became and was lamed and crippled, sick and disordered for a long space of time, to wit, from thence hitherto, during which time the said plaintiff suffered and underwent great pain, and became permanently injured, to the damage of the plaintiff in the sum of ten thousand dollars; and therefore he brings this suit.

W'M F. MATTINGLY,
R. T. MERRICK,
Att'ys for Pl'ff.

5 The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise, judgment.

W. F. MATTINGLY,
R. T. MERRICK,
For Pl'ff.

Subpœna to answer.—Issued Feb'y 10, 1869.

In the supreme court of the District of Columbia, the 10th day of February, 1869.

OLIVER GLADMON, by BURGESS K. GLADMON, his next friend, plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company, defendant. } At law. No. 5533.

The President of the United States to the marshal for said district, greeting:

Summon the defendant in the above-entitled case to appear in
6 said court on or before the first special term thereof, occurring twenty days after service of this writ, and answer the declaration herewith served; and warn him that, on default of so doing, the plaintiff may proceed to judgment and execution at the trial term of said court next after said service. And do you return this writ into the clerk's office immediately after service, so endorsed as to show the time and manner of executing it; and if you cannot serve it within six months, the day of its exclusive, then return it into said office for renewal.

Witness, D. K. Cartter, chief justice of said court.

R. J. MEIGS, *Clerk.*

NOTE.—That the special terms of the court commence on the first Tuesday of every month, except May, in which month they commence on the third Monday, and August, in which month there is no term of the court; and that the trial terms of the court commence on the first Tuesday of February, third Monday of May, and first Tuesday of November, when final judgment may be taken, and execution awarded.

7 *Return of subpœna to answer.—Filed Feb'y* 10, 1869.

The 10th day of February, 1869, served copies of the declaration, notice to plead, and summons on A. W. Nichols, secretary & treasurer of the company.

D. S. GOODING, *Marshal.*

Plea.—Filed March 2d, 1869.

OLIVER GLADMON, by BURGESS K. GLADMON, his next friend,
vs.
THE WASHINGTON AND GEORGETOWN RAIL road Company. } At law. No. 5539.

The defendant comes and says it is not guilty, as alleged in the plaintiff's declaration.

BRADLEY & BRADLEY,
Atty's for Def't.

8 *Joinder in issue.—Filed April 6th*, 1869.

O. GLADMON
vs.
WASH. & GEO'TOWN R. R. CO. } At law. 5533.

The plaintiff joins issue upon the defendants' plea.

W'M F. MATTINGLY,
Attorney for Pl'ff.

Proceedings before the supreme court of the District of Columbia, holding a circuit court and special term, commencing on the 4th Monday, 24th day of January, 1870, Chief Justice Cartter, presiding.

TUESDAY, *Feb'y* 15, 1870.

Session resumed pursuant to adjournment, Chief Justice Cartter, presiding.

OLIVER GLADMON, BY HIS NEXT FRIEND BURgess K. Gladmon, plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN R. R. Co., def't. } 5533. Law.

And now come as well the plaintiff, by his attorneys, Messrs. Mattingly and Merrick, as the defendant, by its attorney, Mr. Bradley, j'r, and
9 a jury of good and lawful men of this district to wit, George W. Stroud, Timothy D. Daley, George W. Huguely, John Webster, Casper Keller, Eben G. Brown, David G. Mallory, James L. Kervaud, James Forrester, John Scrivener, Edward A. Dickens, and James Donaldson, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

FRIDAY, *Feb'y* 18, 1870.

Session resumed pursuant to adjournment, Chief Justice Cartter, presiding.

GLADMAN
vs.
W. & G. R. R. Co. } At law. 5533.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after having received the instructions of the court, retire *the* consider of their verdict, and afterwards return into court, and on their oath say that they find the issue aforesaid in favor of the plaintiff, and assess his damages, by reason of the premises, at the sum of nine thousand dollars, besides costs.

MONDAY, *Feb'y* 21, 1870.

Session resumed pursuant to adjournment, Chief Justice Carter, presiding.

GLADMON
vs.
W. & G. R. R. Co. } 5533. Law.

10 And now again comes the defendant, by its said attorney,

and moves the court for a new trial, and for reasons files the following:

1. The verdict is against the evidence.
2. The verdict is contrary to law.
3. The damages allowed are excessive.
4. Upon the bills of exceptions.
5. The evidence is insufficient.

SATURDAY, *April* 23, 1870.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

OLIVER GLADMON, BY BURGESS K. GLADMON, his next friend, *vs.* THE WASH'N AND GEORGETOWN R. R. CO. } At law. No. 5533.

On argument of the defendants' aforesaid motion for a new trial, the court having informed the plaintiff's counsel that, unless a remittitur of three thousand dollars of the damages awarded by the jury, was entered, he would set aside the verdict a' grant a new trial; whereupon the plaintiff's counsel remits to the defendant three thousand
11 dollars of the damages sustained on occasion of the premises in the declaration mentioned, and thereupon the court overrules the aforesaid motion for a new trial; and upon the plaintiff's motion for judgment against the defendant, of the residue of said damages, it is considered, by the court, that the plaintiff recover against said defendant, six thousand dollars, residue of said damages, in manner and form aforesaid found; and $, costs of suit, and have execution thereof.

And thereupon the defendant, by its counsel, tenders its bill of exceptions to the rulings of the court upon the trial, and prays that the same be signed, sealed, and made part of the record, as of the 21st of February, 1870; and it is ordered accordingly.

12 *1st bill of exceptions.—Statement of the case.*

OLIVER GLADMON, BY BURGESS K. GLADMON, his next friend, *vs.* THE WASHINGTON AND GEORGETOWN RAILroad Company. } No. 5533. At law.

On the trial of this cause, the plaintiff, to maintain the issue on his part joined, offered evidence tending to prove that the defendant was a corporation owning and running a horse-car street railroad, extending from the navy yard, in Washington, to High street, in Georgetown, D. C.; that the plaintiff was seven years of age, and in attempting to cross Bridge street, in Georgetown, along which said railroad runs, without negligence on his part, but through the negligent driving and management of one of defendant's cars, he was seriously injured for life by his leg being caught by the wheel of said car on the track.

13 And the defendant, to maintain the issue on its part joined, offered evidence tending to prove that the driver of said car was not guilty of any negligence; and further evidence tending to prove

that the plaintiff was guilty of negligence, contributing to the injury, and also tending to prove that the said injury was the result of inevitable accident.

On the examination of one of the witnesses for the plaintiff, the following occurred:

By Mr. MERRICK:

Q. I understood you to say that the driver was talking with some one on the platform. Did you observe which way the driver was looking?

A. He was looking down Jefferson street, or that way, to the south of Jefferson street; just as he turned his head, that was the time when the child run and started to come back again. The person with whom the driver was talking was standing right against the car, catching hold of the little iron railing; the driver was on the right side of
14 him, looking in the direction of Jefferson street; the accident happened while this conversation was being carried on.

By Mr. BRADLEY:

Q. The child ran out so suddenly that the man could not have checked his car at that time anyhow?

A. No, sir.

By Mr. MERRICK:

Q. At the rate he was going?

A. Yes, sir.

By Mr. BRADLEY:

Q. I understood you to say the driver was looking down Jefferson street. Do you mean gazing down the street?

A. He was looking at the gentleman, and his face was towards Jefferson street.

By Mr. BRADLEY:

Q. I understand you to say that the boy ran out so suddenly that, if the driver had not been looking at his companion, he would not have been able to prevent the accident?

A. I think, if the driver had not been looking at this man, he could have checked the horses in time.

15 (Answer objected to by Mr. Bradley as not being responsive to the question, and as being the opinion of the witness. Objection overruled by the court, and exception reserved.)

By Mr. BRADLEY:

Q. Upon what do you base your statement that the driver could have stopped his horses in time to have prevented the accident?

A. Only from seeing it done at other times.

By Mr. BRADLEY:

Q. Seeing what done?

A. The car checked.

And said defendant prays the court to sign, seal, and enrol' this its first bill of exceptions; which is accordingly done this day of A. D. 1870.

[SEAL.]

D. K. CARTTER,
Chief Justice.

16 *2d bill of exceptions.*

After the close of the testimony, the defendants, by their counsel, asked the court to give the following instructions to the jury:

I. If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendant's, the burden of proof is on the plaintiff to show affirmatively not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his part, then the plaintiff is not entitled to recover whether the driver of the car was guilty of negligence or not, but the jury must find for defendant.

(Rejected.)

17 II. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidentlly slipped and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable accident, for the consequences of which the defendant is not responsible.

(Rejected.)

III. If the plaintiff's injuries resulted from his attempting to cross the street so suddenly that the driver could not stop the car in time to avoid a collision with him, he is not entitled to recover.

(Rejected.)

IV. That the driver of the car had a right to suppose that the plaintiff, when duly warned, would desist from the attempt to cross

18 the street immediately in front of the car, and if such due warning was given, and it not being heeded, it was then too late to avert the accident, though the driver made every effort to do so, the plaintiff is not entitled to recover.

(Rejected.)

Which the court refused, and to such refusal as to each and all of said instructions the defendants, by their counsel, except, and pray the court to sign, seal, and enrol' this their second bill of exceptions; which is done this 18th day of February, 1870.

[SEAL.] D. K. CARTTER,
Chief Justice.

19 *3d bill of exceptions.*

And instead of instructing the jury, as prayed by the defendants, the court charged the jury as follows:

Charge of the court.

GENTLEMEN OF THE JURY: Oliver Gladmon, an infant, by his next friend, Burgess K. Gladmon, has brought his action upon the case against the Washington and Georgetown Railroad Company, to recover damages for an injury inflicted upon him by the company, as he alleges, through the carelessness of its agent. He claims to have presented you with proof that he has been seriously injured; that he has been injured through the instrumentality of an employee of this corporation.

Further, that he has been injured through the culpable carelessness of this agent, and therefore if this be so he has entitled himself, by his proof, to your verdict, in such amount as shall reasonably compensate him for the injury that he has received. Whether it be so or
20 not, in point of fact, is matter for you to determine. The defendant takes issue upon this claim, both upon the record and in fact, and says that it is not proved, as alleged, that the plaintiff has been injured by reason of the carelessness of the defendant. And he, on his behalf, claims that he has furnished you with satisfactory proof of his position, thus making up an issue of fact that you have got to determine.

Concerning the question of carelessness, the law is appealed to as a standard to determine what constitutes such carelessness as to involve liability. That is an issue that belongs to the court to determine with a view of enlightening the jury in estimating the facts that the respective parties have presented, and that are brought within its operation. I declared before the argument opened, and repeat now, that the duty of these parties to each other in matter of caution is to be regulated by the principle herein laid down, to wit:

21 That the care of the defendant is to be tested by the exercise of adult judgment in treating undeveloped judgment in childhood. That the defendant, in his duty under the law, is to be held to the exercise of adult judgment and caution when brought to bear upon the security of childhood and undeveloped judgment, and as a convertible proposition that the child is to be held to the measure of chilhood judgment; and I will give you some of the reasons for this determination:

This corporation, under the operation of its charter, the authority of the law of its existence, is permitted to appear to occupy the common thoroughfares of this city. It is created to move in those thoroughfares with the machinery that it has adopted as a carrier.

It is not contemplated by law, under the authority of their creation, that they occupy the thoroughfares of this city and Georgetown, to the exclusion of an occupation, the right of the citizens of the cities
22 to do so—an easement that belongs to all men, women, and children of all grades of intelligence and circumspection, from the lowest grade of description to the highest. The rule that I have laid down covers the whole compass of description—from childhood to manhood, from infant judgment to ripe judgment—and was determined by the court for the reason that the occupation of these streets is the common property of all in common and the regulation of the intercourse each with the other must have reference to and be qualified by that common right.

I do not wish to be understood in advancing this rule for my government, as saying that this corporation are compelled to work this road through the thoroughfares of the streets of the district, as amid a population of blind or deaf men. They are not obliged to furnish eyes that others may see, or ears that others may hear. The responsibility of the highway is not theirs alone, but every person who enters upon it, enters upon it under the obligation to exercise a certain judgment in the preservation of his or her own life.

23 The degree of that accountability varies with the age and capacity of the individual, until you get to a point where the occupant of the highway is utterly disqualified from protecting him or herself for the want of discretion.

At that point the liability to exercise discretion for him, is to be found

in another quarter than with the stranger. At that point the liability of the guardian attaches and not the liability of the defendant.

There is another suggestion in explanation of this text of the law, as the court has given it, which it may not be improper to give at this time.

While the railroad, in working its cars through this city, is charged with caution, and strict caution, as far as their movement may affect adversely the rights of others, they are chargeable with no higher caution than can be exercised with the machinery which the law permits them to employ in performing the service of a common carrier in the district. This remark is made with reference to the character of
24 a car, and the difficulty in bringing it to an instant pause. The car, to be of any service to the public, must be in motion—must move at intervals at least; and when in motion, its momentum requires time to bring it to a pause.

There is nothing in the obligation of a circumspection resting upon this company that compels them to do what cannot be done. They have a right to the measure of time necessary to bring their car to a state of rest. There is no other rule by which these different interests of different citizens, and under different circumstances, can be regulated in the enjoyment of a common easement. They have the right to pass across, and the right to pass over the streets of the cities; and in estimating the proof for the plaintiff and the defendant in this case, it is your duty to look upon the relations of each to the other, and the rights of one citizen with another in a common enjoyment and a common right, and answer, yourselves, the question, Have these relative rights
25 been offended in this case, as made manifest by the proof? If they have, trace the violation to the offender, and hold him accountable in the consequence of his violating the right.

I am requested to say to you that if the defendant in this case was in the wrong, if the car of the defendant was moving with greater speed than good precaution and judgment would dictate, yet if you find from the testimony that the plaintiff, by his own act and in his own fault, superinduced the injury of which he now complains, that he may not recover.

That is the law, gentlemen, but in estimating that you will go back again to the foundation principle laid down in the government of the law of this case, and estimate the fault, the indiscretion, by the measure of the years of the plaintiff. You have got to adopt one of two rules here, and I have concluded it to be my duty to adopt the rule I have laid down: Either to judge this child's conduct under the measure of his years, and the measure of his discretion, or pronounce that
26 no action lies in behalf of a child, or demand of the child a measure of judgment that nature has not given to him, which would be a greater outrage upon good logic than to pronounce he had no remedy.

Now, if you find from the facts that this child interposed himself in the way of this car at a time when it could not be arrested, and under circumstances where he could not be seen under watchful, reasonably watchful, strictly watchful care on the part of the driver, where the car could not be brought to a pause early enough to save his body from injury, the defendant is not liable. If you find, on the contrary, that this child came upon the theatre of observation there at a time when the driver, attending to his duty, may have observed him, and observed him as an infant, with power to arrest his car to save him, you will hold

this corporation responsible for the injury done to him; and it appears to me that the whole case lies pretty much there, too.

27 However, I do not wish to comment on the facts. That is your province. Take the case and dispose of it.

To which charge the defendants except, for the reason that said charge omits to instruct the jury correctly as to the effect of the plaintiff's contributory negligence on his right to recover, and also that the following propositions in said charge are erroneous:

"That the care of the defendant is to be tested by the exercise of adult judgment in treating undeveloped judgment in childhood; that the defendant, in his duty under the law, is to be held to the exercise of adult judgment and caution when brought to bear upon the security of childhood and undeveloped judgment, and, as a convertible proposition, that the child is to be held to the measure of childhood judgment. And I will give you some of the reasons for this determination.

"It is not contemplated by law, under the authority of their creation, that they occupy the thoroughfares of this city and Georgetown to the exclusion of an occupation, the right of the citizens of the

28 cities to do so—an easement that belongs to all men, women, and children of all grades of intelligence and circumspection, from the lowest grade of description to the highest. The rule that I have laid down covers the whole compass of description—from childhood to manhood, from infant judgement to ripe judgment—and was determined by the court for the reason that the occupation of these streets is the common property of all in common, and the regulation of the intercourse each with the other must have reference to and be qualified by that common right.

"The degree of that accountability varies with the age and capacity of the individual until you get to a point where the occupant of the highway is utterly disqualified from protecting him or herself for the want of discretion.

"I am requested to say to you, that if the defendant in this case was in the wrong—if the car of the defendant was moving with greater speed than good precaution and judgment would dictate, yet if you find from the testimony that the plaintiff, by his own act, and in his own fault superinduced the injury of which he now complains, that he may not recover.

29 "That is the law, gentlemen, but in estimating that you will go back again to the foundation principle laid down in the government of the law of this case, and estimate the fault, the indiscretion, by the measure of the years of the plaintiff. You have got to adopt one of two rules here, and I have concluded it to be my duty to adopt the rule I have laid down: Either to judge this child's conduct under the measure of his years and the measure of his discretion, or pronounce that no action lies in behalf of a child, or demand of the child a measure of judgment that nature has not given to him, which would be a greater outrage upon good logic than to pronounce he had no remedy.

"Now, if you find from the facts that this child interposed himself in the way of this car at a time when it could not be arrested, and under circumstances where he could not be seen under watchful, reasonably watchful, strictly watchful care on the part of the driver; where the car could not be brought to a pause early enough to save his body

30 from injury, the defendant is not liable. If you find, on the contrary, that this child came upon the theatre of observation there, at a time when the driver, attending to his duty, may have observed

him, and observed him as an infant, with power to arrest his car to save him, you will hold this corporation responsible for the injury done to him, and it appears to me that the whole case lies pretty much there, too."

And they pray the court to sign, seal, and enrol' this their third bill of exceptions; which is accordingly done this 18th day of February, A. D. 1870.

D. K. CARTTER, [SEAL.]
Chief Justice.

31 Proceedings before the supreme court of the District of Columbia, in general term, commencing on the third Monday, 18th day of April, 1870.

MONDAY, *April 18th*, 1870.

By order of the Chief Justice, the opening of the court proclaimed by the marshal. Present, the chief justice, and Justices Olin and Wylie. Justice Fisher absent holding the criminal court.

SATURDAY, *May* 14, 1870.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin and Wylie.

OLIVER GLADMON, BY BURGESS K. GLADMON, his next friend, *vs.* THE WASHINGTON & GEO. R. R. CO. } No. 5533. At law.

Argued by Mr. Bradley, counsel for the defendant, and by the counsel for the plaintiff, and submitted to the court.

32 SATURDAY, *May* 21, 1870.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Olin and Wylie.

OLIVER GLADMON *vs.* THE WASH. & GEO'N R. R. CO. } 5533. Law.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the court here, that neither in the record and proceedings aforesaid, nor in giving the judgment aforesaid is there error, it is considered that the said judgment be, and the same is hereby, in all things affirmed; and that the plaintiff recover against the defendant the costs by him about his suit in this court sustained, and that he have execution thereof and of the judgment of the said circuit court.

33 In the supreme court of the District of Columbia, the 25 day of May, 1870.

OLIVER GLADMON, BY HIS NEXT FRIEND, BURGESS K. Gladmon, *vs.* THE WASHINGTON & GEORGETOWN RAILROAD Company. } At law. No. 5533. In error.

Know all men by these presents that we, Sylvanus S. Riker, pres't,

W'm Orme, Gilbert Vanderwerken, are bound unto the above-named Oliver Gladmon in the sum of thirteen thousand dollars, to be paid to the said Oliver Gladmon, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 25th day of May, 1870.

Whereas the above-named The Washington & Georgetown Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

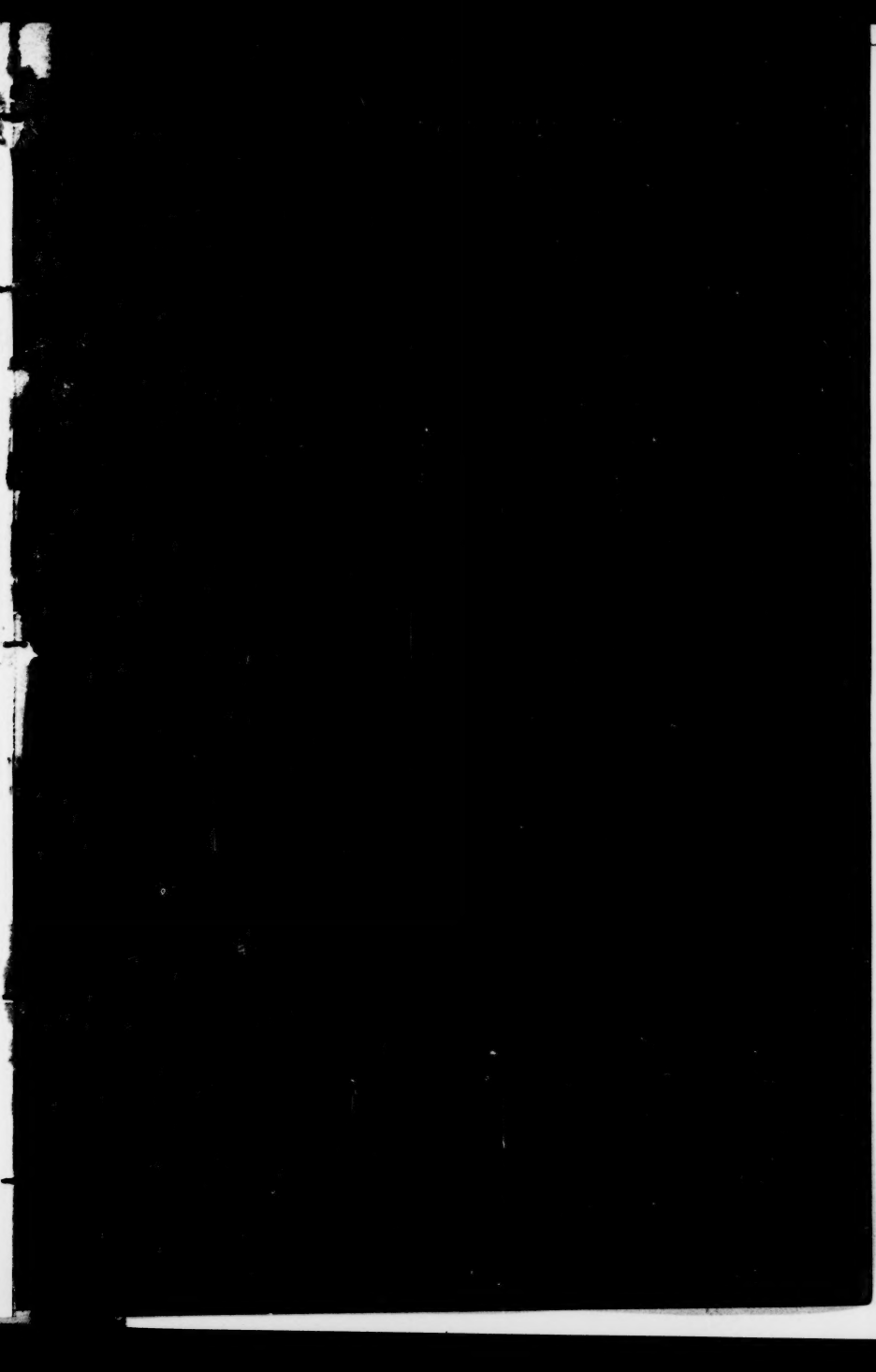
Now, therefore, the condition of this obligation is, that if the above-named The Washington & Georgetown Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

S. S. RIKER, *Pres't.* [SEAL.]
W'M ORME. [SEAL.]
G. VANDERWERKER. [SEAL.]

Sealed and delivered in presence of—
A. W. NICHOLS.

The within bond is hereby approved, this 26th day of May, A. D. 1870.
[OFFICIAL SEAL.] D. K. CARTTER,
Chief Justice.

(Indorsement on cover:) No. 535. The Washington and Georgetown Railroad Company, plaintiff in error, vs. Oliver Gladmon, by his next friend, Burgess K. Gladmon. Dist. of Columbia sup. court. Filed 11th April, 1871.



In the Supreme Court of the U. S.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *vs.* OLIVER GLADMON.	No. 89. In error to the Supreme Court of the District of Columbia.

Oliver Gladmon, the plaintiff in the Court below, in the year 1863, being about seven years of age, crossed or was crossing a street in Georgetown, in front of a car of the plaintiff in error, then pursuing its accustomed route along the said street, drawn by horses. From some cause he turned and started to run back, and was struck by the horses, run over by the car and badly injured.

On the trial of the cause the defendant below prayed the Court to instruct the jury as follows:

I. If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendants, the *burden of proof* is on the plaintiff to show affirmatively not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that negligence or want of care or caution of the plaintiff caused the accident or even

contributed to it, or that it could have been avoided by the exercise of due care on his part then the plaintiff is not entitled to recover, whether the driver of the car was guilty of negligence or not, but the jury must find for the defendant.

II. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidently slipped, and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable accident, for the consequences of wlrich defendant is not responsible.

III. If the plaintiff 's injuries resulted from his attempting to cross the street so suddenly, that the driver could not stop the car in time to avoid a collision with him, he is not entitled to recover.

IV. That the driver of the car had a right to suppose that the plaintiff, when duly warned, would desist from the atttempt to cross the street immediately in front of the car, and if such due warning was given, and it not being heeded, it was then too late to avert the accident, though the driver made every effort to do so, the plaintiff is not entitled to recover.

The Court refused to give either or any of these instructions, and the defendant excepted. (See p. 7.)

The Court then proceeded to charge the jury, and in the course of the charge stated various propositions of law, which will be found on pp. 10 and 11, to which the defendant excepted. The whole charge is set out in the Record, pp. 7, 8, 9, 10, and the exceptions on the 10th p.

The statement of facts pages 5, 6 on which these prayers and the charge is founded is so brief and imperfect, that it can only be inferred from these prayers and the charge

that certain proof was introduced on which they were founded and those additional facts must be assumed to have been given in evidence.

There is however in addition to this general statement of the evidence, a fragment of the proof to be found in the first exception on page 6, which will enable the Court to see that proof of the transaction was introduced to support the instructions asked.

The first exception was taken to the admissibility of certain evidence which is not deemed material in the case, and the exception is waived.

The exception to the 4th prayer is also waived.

Assignment of Error.

The plaintiff in error says the Court below erred in this:

First, in refusing to give the first, second and third instructions as prayed for by the defendant below, hereinbefore set out, and as to each and every of the said prayers.

Second, That the Court erred in charging the jury as set out in the exception on page 10 of the record.

POINTS.

First. The first prayer is in itself, as applied to adult persons, supported by authorities in Maine, Massachusetts, Connecticut, New York, Maryland, Indiana, Illinois, and Wisconsin, and denied in two cases, one in New Jersey, and the other in Pennsylvania, as follows:

Waldron v. Portland, &c., 35 Maine ~~385~~; 422. 2 3

Lucas v. Taunton, &c., R. R. Co., 6 Gray, 64. 76

Park v. O'Brien, 23 Conn., 339. 345 ~ 29 Conn 209

Welling v. Judge, 40 Barb., 193. 209-10

Owings v. Jones, 9 Mary'd, 108.

Evansville R. R. v. Hiatt, 17 Ind., 102.

Dyer v. Tolcott, 16 Ill. 300.

Dressler v. Davis, 7 Wis., 527.

And see 1 Hilliard on Torts, pp. 140, 141.

Contra

Durant v. Palmer, 5 Dutch, 544,

Pennsylvania R. R. Co., v. McTighe, 46 Penn. 316.

The rule in England as to the burden of proof being and continually remaining on the plaintiff is strongly affirmed in the following cases:

Cotton v. Wood, 8 Scott C. B. (N. S.,) 568, [1860,] a leading case.

Toomey v. London, Bright & S. E. R. Co., 3 C. B., (N. S.,) 146.

Corman v. Eastern Co. R. Co., 4 H. & N., 787.

Pearson v. Plunkett, 20 Law T., (C. P.) 662, [1869.]

Hammack v. White, 11 C. B., (N. S.,) 588, a case strongly affirming the rule.

Second. This rule applies equally to cases of infants who are of an age sufficient to exercise discretion, and that discretion is to be according to the capacity of the infant.

Shearman & Redfield on Negligence, pp. 53, 54, say, "It seems to be generally agreed that an infant is to be

held, as far as he is personally concerned, only to such a degree of care as is usual among children of his age, though if his own act brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of the injury the latter cannot recover damages," again p. 55, "of course no one is liable for an injury produced entirely by want of discretion on the part of the child who suffers from it: for example, where a child throws itself in the way of a horse and is run over before the driver can prevent it." These proposition are fully supported by the cases in the notes.

Brannan v. Brooklyn City R.R. 36 Barb 236

Third This leaves the question as to the burden of proof precisely as in the case of an adult. And if the infant contributed to the injury by his own act, he is no more entitled to take advantage of his own wrong than an adult.

Here the only evidence set out in the record is to be found on p. 6, where the plaintiff's witness in answer to the first question, says, "He (the driver) was looking down Jefferson street, or that way to the south of Jefferson street, *just as he turned his head that was the time when the child run and started to come back again.*" To the next question, "The child ran out so suddenly that the man could not have checked his car at that time at any rate?" "No sir." "At the rate he was going? "Yes sir," It is no where stated that he was going at more than ordinary speed, and it is evident the child had crossed, or was crossing the track, and had started to go back, when the collision occurred.

Here was evidence either of an excusable accident on the part of the driver, or of mutual contribution by plaintiff and defendant, or the sole act of the plaintiff,

in either of which cases the instruction should have been given and it was error to refuse it.

SECOND.

As to the second prayer: there was evidence to show plaintiff negligently, or rashly attempted to cross the street in front of the car and although it is not set out in the bill of exceptions that there was any proof of his having fallen on or near the track when endeavoring to turn back, when it was too late to stop the car, it is fairly to be presumed that there was such evidence in the case, and the more so because the Judge simply refuses the instruction, which, on the authority of all the cases, is law, without assigning the want of proof as his reason, or giving any reason for it.

If there was such proof no authority need be cited to show that the Court erred.

THIRD.

As to the third prayer. If an infant of seven years is chargeable with discretion to go about the streets without parents or guardian where horse cars are drawn, and did in fact, of which there is evidence in the record, attempt to cross the street suddenly in front of the car, the burden of proof was on the plaintiff to show that the driver could have stopped the car in time to prevent the collision. See Cotton v. Wood, *sup.* In the absence of such proof the presumption should be in favor of the defendant, who, as will be shown hereafter is to be charged with ordinary care only as applied to its business, and the fact of the collision does not shift the burden of the proof.

The refusal of the Court to grant the instruction was erroneous.

Shearman & Redfield, on Negligence, § 10, p. 1.

FOURTH.

The third bill of exceptions, p. 10, is two fold: first, that the charge omits to instruct the jury correctly as to the effect of plaintiff's contributory negligence on his right to recover; and second, that the propositions in said charge set out on p. 10 are erroneous.

The whole charge is spread on the record. There is certainly no ~~such~~ reference to the rule of law touching the acts of the plaintiff in reference to the proximate cause of the injury, and contributing to that injury. Express

The rule on this subject will be found full and fairly stated by Shearman & Redfield, p. 23, § 25, as follows:

"One who is injured by the mere negligence of another "cannot recover at law, or in equity any compensation "for his injury, if he by his own, or his agent's negli- "gence, or wilful wrong doing, contributed to produce "the injury of which he complains; so that, but for his "concurring and co-operating, the injury would not "have happened to him," and it is supported by such an array of authorities as seem fully to establish it.

Tested by this rule, if the charge does not contain any reference to it, it is erroneous. The three cases which he puts are; 1st, where the plaintiff by his own act and in his own fault superinduced the injury." This is not contributory negligence, but is a case in which the defendant is free from fault; 2d, when "this child interposed himself in the way of this car, at the time *when it could not be arrested*, and under circumstances *where he could not be seen under* * * * *strictly watchful care*, when the car could not be brought to a pause early enough to save him." This also is a case, not of contributory negligence, but of freedom from blame on the

part of the defendant: 3d, where "the driver of the car attending to his duty may have observed him as an infant, with power to arrest his car to save him." This ignores all the doctrine of contributory negligence on the part of the plaintiff, and makes the defendant responsible, although the jury may have been satisfied from the proof that the plaintiff had intelligence enough to have stepped out of the way in time and did not, or delayed it too long and fell in the attempt, or any other thing, was the proximate cause of the collision. In each of them, it intended to touch the question of mutual fault, the charge was erroneous.

FIFTH.

The Court erred in holding as a rule of law and so instructing the jury, the defendants are to be held "to the exercise of adult judgment and caution when brought to bear upon the security of childhood, and undeveloped judgment" and * * "the child is to be held to the measure of childhood judgment."

1. There is no legal measure of childhood, or of adult judgment. These are elements of fact for the jury—not of law for the Court. Each case must depend on its own facts and circumstances to be found by the jury, subject to the judicial interpretation of those facts. Robinson v. Cone, 22 Ver., 213. That is, the question of negligence is a mixed question of law and fact. In the present and like cases the duty of care and caution does not depend, nor is it to be measured by adult judgment, but by the business in which the party is engaged on the one part, in which the public is interested, and by the obligation of the other party to protect himself from harm. The extent of the capacity to discharge this latter obligation either by reason of infancy or any infirmity does not af-

ford a legal excuse. It is but a fact to be found by the jury.

Burke v. Broadway & 7 Av., 49 Barb., 529.

2d. The application of this "text of the law" to this particular case was erroneous and injurious to the defendant for after stating "if the plaintiff by his own act and in his own fault superinduced the injuries of which he now complains, he may not recover," he immediately qualifies it by adding, "but in estimating that you will go back to *the foundation principle laid down in government of the law of this case*, and estimate the fault, the indiscretion by the measure of the years of the plaintiff." See Burke v. Broadway & 7 Av., &c., (above.)

(*a*) As we have seen the law of contributory negligence does not require, that the plaintiff, by his own act or fault, should have *superinduced* the injury. His act or fault must have been proximately connected with it so as to have made it mutual. But when this is the case, as we have also seen, the fact of infancy is not *per se* a sufficient legal excuse to throw the whole responsibility on the opposite party. It is one of the facts to be considered by the jury, with all the other facts in the case, and the infant is to be charged by the jury with responsibility, and if the jury shall find, that, ordinarily, other boys of like age, would not have acted as he did; if they find that responsibility, and that his act contributed to the injury, he is to be charged as though he were an adult. The effect of this portion of the charge is to lead the jury to believe, that if the boy were only seven years old, he could not be charged with contributory negligence. In this the Court erred.

Phila. R. R. Co. v. Spearin, 47 Penn., 318. 300

Burke v. Broadway, & 7 Av., (above.)

State use of Conrad Fryer v. Balt. & Oh. R. R., 30 Maryd., 51, 52, 53.

State use of Coughlin v. Same, 24 Maryd., 85.

State use Bannon v. Same, Ib. 108, 121, 122, 125.

(*b*) The Judge says if the driver could not see the boy in time to stop his car with *strictly watchful care*, he is not liable. This rule is erroneous. The driver is as to *third* persons, not passengers, chargeable with only ordinary care, and caution.

See O'Bannon v. Balt. & Ohio R. R., 24 Md., 108.

And the reason is obvious. The business is like that of omnibuses and hackney coaches, and other vehicles for the transportation of passengers in cities. The well defined track, the frequency and regularity of the transit of the cars, the sound with which they run, the bell attached to the horses, the bulk of the car are so many warnings to persons crossing the track and tend to arouse care and caution, while the low rate of speed at which they run and the time required to bring them to a stop give ample opportunity to escape danger. The driver of such cars has a divided duty. He has not only to look to the protection of his employers and his passengers, and the safety of those who may cross his track, but his duty is also to look out for fares so as to stop his car in time. These facts are all well known and understood in the community, and act as notice to all.

It was therefore error in the Court to instruct the jury that the defendant, were to be held to *strictly* watchful care in conducting their cars along the streets so far as third parties, not passengers, were concerned.

Ordinary care in case of a street car would require a greater degree of care than in driving a slow team along

a country road. But, *watchful, reasonably* watchful. *strictly* watchful care must mean the *utmost* care.

Finally, the last sentence of the charge to wit: "If you find on the contrary, that this child came upon the theatre of observation, at a time when the driver, *attending* to *his duty*, may have observed him, and observed him as an infant, with power to arrest his car to save him, you will hold this corporation responsible for the injury done to him."

He had just said the driver was to be held to *strictly* watchful care, and this must be what he meant by "attending to his duty." If the driver was bound only to the use of ordinary care and diligence, this instruction was erroneous.

But suppose him to have been bound to a still higher degree of care and caution, the error is still apparent.

If an infant can be charged with the duty of care and caution, and with contributing to an injury by failing to exercise them, this is completely ignored in this part of the charge.

An infant cannot recover if by his own act and fault he contributed directly to the injury of which he complains.

Hughes v. McFie, 2 Hurls & Colt, 744, 748.

Mangan v. Allerton, 1 Ex. 239, (1866) Law. Reports.

Hartfield v. Roper, 21 Wend., 215.

Burke v. Broadway & 7 Ave., cited above.

The cases from Md. Reports, vols. 24, 30. above.

Phila. R. R. Co. v. Spearen, 47 Penna. above cited.

It is clear from the only evidence specifically set out

in this record that the boy was on the "theatre of observation" having crossed the track, or was attempting to cross the track, and that he turned and ran back *before* the accident happened. If he had crossed he was safe upon the "theatre of observation" before he was injured, and under circumstances which dispensed the driver from further caution as to him. If he was crossing when first seen, and turned back, instead of going on, did not this contribute to the injury? That was purely a question for the jury. Had he sense enough to know better? That also was a question for the jury, but both are excluded by the instruction, and it was erroneous.

It seems to be one of those cases too frequently occurring in our streets in which a small boy, by way of bravado, runs across the track of the street cars, under the noses of the horses, and escapes; while here, either in attempting to run back in the same spirit, or from some other cause, he is a moment too late and is injured by his own act and fault.

JOS. H. BRADLEY,
JOS. H. BRADLEY, JR.

In the Supreme Court of U. S.

DECEMBER TERM, 1872.

THE WASHINGTON AND GEORGETOWN R. R. Co., *Plaintiff in error*,
vs.
OLIVER GLADMON, BY HIS NEXT FRIEND BURGESS K. GLADMON.
No. 89.

Brief of Defendant in Error.

The defendant in error, (plaintiff below,) a boy seven years of age, sued the Washington and Georgetown Railroad Company, for damages for injuries received by him by reason of one of the Railroad Company's horse-cars being driven against and upon him while crossing the street, through the negligence and carelessness of the driver.

The first exception is to an answer of one of the plaintiff's witnesses in cross-examination as not being responsive to the question, and because the same was an expression of the witness' opinion.

The second exception is to the refusal of the Court to grant the defendant's four prayers.

The third exception is to certain portions of the charge of the Court to the jury.

Points.

I. As to the first exception.—

It is apparent from the extract of the testimony set out in this bill of exceptions, that the answer is clearly responsive, and the question called for an expression of the witness' opinion. The witness had not said what Mr. Bradley professed to have understood him as having said, and evidently construed it, as he was justified in doing, as if it had been, "do you say that the boy ran out so suddenly, &c.?" and answered it accordingly. It was an indirect way of putting a question which the counsel did not wish to put directly.—

II. As to the second bill of exceptions.

The Court overruled all of the defendant's prayers, and charged the jury as to the questions of law. This he had a right to do if his charge presented the law of the case fairly to the jury.

The first prayer was not law, because it sought to hold the plaintiff, a child seven years of age, responsible for the same degree of care as an adult.

The other prayers were substantially granted by the Court in its charge.

III. As to the third bill of exceptions.—

This presents the only question in this case, viz: whether in suits of this nature, brought by a child of tender years, the jury in deciding whether the negligence of the plaintiff contributed to his injuries is to hold him responsible for the same degree of judgment they would

an adult, or merely to that degree of prudence and caution to be expected from a child of his age. The Court below decided that the child was to be held to the measure of childhood judgment.

That this is the true rule of law, see—

31 Pen. St. (7 Casey,) 358, Ranch v. Lloyd and Hill.
do. 372, Penn. R. R. Co. v. Kelly.
48 do. (12 Wright,) 218, Smith v. O'Connor.

Opinion of Court delivered by Justice Strong. This case is similar in many respects to the case at bar.

66 Penn. St., 269, Kay v. Pa. R. R. Co.
1 Ad. & El. (41 Eng. C. L.,) 422, Lynch v. Nurdin,
1 Daly 89, Honigsburger v. 2d Av. R. R. Co.
4 Allen 431, Munn v. Reed.
22 Vt. 213, Robinson v. Cone.
19 Conn. 507, Birge v. Gardner.
23 Wisc. 186, Schmidt v. Milwaukee, &c., R. R. Co.
18 Ohio St., 399, 408, Bellefontaine, &c., R. R. Co. v. Snyder.
30 Md. 47, Balto., &c., R. R. Co. v. The State.
Sher. & Red., on Negligence, 51 et seq. and notes.

R. T. MERRICK,
W. F. MATTINGLY,
Attorneys for defendant in error.

3 E. D. Smith, 103 – Oldfield v. N. Y. & H. R.